has no claim for a Federal court to protect his rights or redress his wrongs touching that contract. If we are ever to be relieved from the uncertainties which attend the administration of justice in non-Federal cases in the Federal courts, it will be by the adoption of one simple test, easily understood and applied. *If the jurisdiction of the court grows out of the subject matter of litigation, it should be dealt with as if there were no such thing as State courts. If the case does not belong to this class, it should be dealt with as if there were no Federal courts.*

HOMER C. MECHEM.

LEGAL NOTES.

Doles v. *Powell* involved another phase of the Legal Holiday question in Pennsylvania. The case was decided, November 24, 1890, upon this opinion of ARCHBALD, P. J. (reprinted in full from the *Lackawanna Jurist*, pp. 429–31): "By the rule of reference entered by the plaintiff, the choosing of arbitrators was fixed for the thirtieth day of May last. This was Decoration day, and therefore, according to the statute, a holiday. The defendant did not attend and arbitrators were chosen in his absence. The question is whether this was valid. It is a mistake to suppose that the day termed Decoration day is merely a holiday with respect to paper due or presentable at banks. Whatever may be the effect in this regard of the statutes creating the other legal holidays which we have, the act relating to Decoration day is not so limited (Act 28 May, 1874, P. L. 222.) The act is short and I will quote it. [See 29 AMERICAN LAW REGISTER 179.] It will be seen from this that the provision relating to bank-paper is distinct from and subsequent to that section of the statute which establishes the day as a holiday. This therefore cannot be regarded as the controlling purpose of the day; it is merely a legal incident of it, and for the greater certainty finds its way into the statute. The day having been created a holiday, must be given all the incidents of such a day, and among these we recognize the right to be free from the obligation of ordinary compulsory legal process. (See an able and exhaustive article on this subject in Amer. Law Register, vol. XXIX, 137-190). If such be the case, the defendant here was not bound to attend and choose arbitrators upon the day fixed by rule, nor could a lawful choice be made in his absence. The prothonotary had a right to close his office upon that day, and it was to be presumed that he would take advantage of this privilege. The fixing of the day was the act of the plaintiff, and not of the prothonotary, and there was nothing therefore to indicate to the defendant that the office would not be closed. He was not bound for this reason, if for no other, to attend and see whether the office would be open or not. The rule of reference was compulsory, and it was rendered uncertain in its effect by the fact that the day fixed for choosing arbitrators was a holiday, the plaintiff has only himself to blame for it. The choice of arbitrators being invalid, all the subsequent proceedings must fall with it. The rule of reference is set aside, and the award of arbitrators vacated."

Manchester v. *Massachusetts* decided by the Supreme Court of the United States, March 16, 1891, has a political interest, from one of its resolutions being that every nation has a territorial jurisdiction over tide waters adjacent to its coasts of not less than a marine league. Justice BLATCHFORD added, in writing the opinion of the Court, that "The open sea within this limit, is, of course, subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war, or for the prevention of frauds on its revenue, exercise an authority beyond this limit," citing Gould on Waters, pt. 1, ch. 1, §§ 1–17, and notes; *Neill* v. *Duke of Devonshire* (1882), L. R. 8 App. Cas. 135; *Gammell* v. *Commissioners* (1859), 3 Macq. H. L. Cas. 419; *Mowat* v. *McFee* (1880), 5 Can. Sup. Ct. 66; *Queen* v. *Cubitt* (1889), L. R. 22 Q. B. Div. 622; Stat. 46 and 47 Vict. ch. 22; *Direct U. S. Cable Co.* v. *Anglo-Amer. Tel. Co.* (1877), L. R. 2 App. Cas. 394. The case arose from a complaint against the officers and crew of a menhaden steamer for seining in Buzzard's Bay, contrary to the Massachusetts Statute of 1886, ch. 1, § 1. The steamer had been duly licensed by the United States, and immunity was claimed, upon the principle that fishing upon the high seas was a part of that commerce which fell within the jurisdiction of the United States. Justice BLATCHFORD declared Buzzard's Bay not to be a portion of the high seas, and even if it was, that the regulation of fisheries is exercised by the States, just as is the regulation of pilots, until Congress asserts its will by some affirmative legislation.

Packer v. *Bird et al.* was decided by the Supreme Court of the United States, January 19, 1891, on a writ of error to the Supreme Court of California. The case was a suit for the possession of an island of some size in the Sacramento River, and by the assumption of Justice FIELD (who wrote the opinion), above the ebb and flow of the tide, but in navigable waters. The plaintiff deduced title to property on the west bank of the river, from a patent issued by the United States, and describing the eastern boundary of the tract to be on the margin of the river. From this description, the plaintiff claimed title to the island as lying on his side of the middle of the stream. Recognizing the common law rule of ownership *ad medium aquæ filum* (see 27 AMERICAN LAW REGISTER 796–9), the Court proceeded to point out anew the difference between rivers in England and America, and to reaffirm the definition of public navigable streams, declared by the same Justice in *The Daniel Ball* (1871), 10 Wall. (77 U. S.) 557, 563 (see 29 AMERICAN LAW REGISTER 744), as being such as "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are, or may be conducted in the customary modes of trade and travel on water." This rule was first declared in *The Genesee Chief* (1851), 12 How. (53 U. S.) 443, 455, and is derived from the Roman law, "which took its rise in a country where there was a tideless sea": READ, J., *Bridge Co.* v. *Kirk* (1863), 46 Pa. 112, 120. After alluding to the acceptance of the Roman doctrine by most of the States, and citing the Pennsylvania case just mentioned, as well as *People* v. *Appraisers* (1865), 33 N. Y. 461, 499,

and *McManus* v. *Carmichael* (1856), 3 Iowa 1, for their exhaustive consideration of the different State court decisions, the court proceeded to accept the view of the California Court, that the title of the plaintiff did not extend further than the margin of a navigable stream. An error should be avoided: the view of the California Court was not adopted because the case was an appropriate one for following the decision of the State Court (*ante*, page 372); on the contrary, the claim of the plaintiff depended upon the construction of a grant made by the United States, and the State Court happened to take the view already adopted by the United States Courts, as already mentioned.

U. S. ex rel. Boynton v. *Blaine*, decided March 23, 1891, by the Supreme Court of the United States, resulted in the affirmance of a judgment of the Supreme Court of the District of Columbia, refusing a *mandamus* to compel the Secretary of State to pay over certain moneys allowed to the petitioner on account of a claim against the government of Mexico. This decision proceeded upon the ground that the political department of the United States had not yet parted with its power over this claim, by reason of certain charges of fraudulent imposition practiced by the claimants, and therefore the writ could not be allowed to coerce executive judgment or discretion. Following *Frelinghuysen* v. *Key* (1884), 110 U. S. 63, the special contention was denied that the claimants had any final adjudication in their favor arising from a finding by an umpire under the convention of July 4, 1868 (15 Stat. at Large 679), between Mexico and the United States. In other words, Chief Justice FULLER was careful to reassert the principles already declared by the Court in *U. S.* v. *Windom* (1891), 137 U. S. 636; *U. S.* v. *Black* (1888), 128 U. S. 40, 48, and *Taxing Dist.* v. *Loague* (1889), 129 U. S. 493, 520; in substance, that a *mandamus* confers no new authority, requires the person to be coerced to have the power to do the act voluntarily, and therefore enforces no more than a bounden duty not dependent upon executive discretion. Justice BRADLEY, considering another phase of the question in *U. S.* v. *Black*, refused to interfere in the exercise of ordinary executive duties involving an interpretation of the law, because the Court had no appellate power in such case, adding, that a refusal to exercise executive discretion or to perform a ministerial duty must, however, be good ground for a *mandamus*. These sentiments were cited with approval by Justice LAMAR in *Redfield* v. *Windom*, after calling attention to one other element of the relator's case, namely, want of other adequate remedy. This subject was considered in an annotation to *Bates* v. *Taylor, Governor*, in 28 AMERICAN LAW REGISTER 350, 354, within the narrow but important lines of the power to issue the writ to a chief executive, though briefly distinguishing cabinet officers from the President. The annoter concluded that the Executive ought to be free from judicial control, as was the decision of the Court in the case annoted. Since the publication of this annotation, the Supreme Court of Nebraska has awarded a *mandamus* against Governor Thayer and the other members of the State Board of Canvassers, to compel the canvassing of the votes for a judge of the Sixth Judicial District of that State: *State* v. *Thayer et al.*, January 2, 1891. The opposition to the issuance of the writ, so far as general principles applied, was made in behalf of the Governor alone, and only "in view of the public interest, and a desire to have all questions raised by the proceedings passed upon," rather than from a disposition to urge an objection. The Court examined High on Extraordinary Legal Remedies § 118, and Maxwell on Pleading and Practice 735, following the latter, quoting with approval these sentences: "There is a

conflict in the authorities as to the right of a court to grant a *mandamus* against the governor of a State, to compel the performance of a merely ministerial duty. That the courts have jurisdiction in such cases, there seems to be no doubt. In a free government, no officer is above the law, and should not be permitted to disregard it with impunity. No good reason can be given why a governor, whose duty it is to see that the laws are executed, should himself be permitted to set them at defiance." There is, therefore, still a conflict among the decisions of the different State Courts.

Davis v. *State of Texas* was decided April 13, 1891, soon after the other two murder cases from that State, one of which was printed (*ante*, page 359), and three of the objections raised to the action of the State Courts were similar and similarly decided to those in *Duncan* v. *McCall;* another to that in *Caldwell* v. *Texas;* the fifth and sixth objections that a continuance had been refused, were also denied as presenting no Federal question, the Court speaking by Chief Justice FULLER, once more declaring that "the Fifth and Sixth Amendments of the United States were" restrictive of the powers of the Federal Government, and not restraints upon the States. The seventh objection was, that the jury were not instructed upon murder in the second degree, as required by § 607 of the Penal Code, but no federal right, title, privilege or immunity was claimed at the trial; hence there was no Federal question, and it was not in the province of the Supreme Court of the United States to pass upon any such question. That is, there was due process of law, and the accused was compelled to abide, in this respect, under the judgment of the State Courts. *Calton* v. *People* (1889), 130 U. S. 83, was distinguished as a case "which came directly to us from the Supreme Court of the Territory" of Utah, "and the inquiry related to the commission of mere error, and statuary provisions like those of Texas were not under consideration. A writ of error to review the judgment of the highest tribunal of a State stands on far different ground, and cannot be maintained in the absence of of a Federal question, giving us jurisdiction." In this latter case, the Territorial Court failed to charge the jury that they had the right to recommend imprisonment at hard labor for the death penalty on conviction of murder in the first degree. So all of these Texas cases failed to secure a reversal. The most singular part of the arguments advanced by the appellants was that founded on one of the first twelve Amendments, as these apply to the United States, and not to the several States; *Presser* v. *Illinois* (1886), 116 U. S. 252, where the commander of the Chicago Lehr and Wehr Verin had been arrested and punished for commanding a parade of that organization in military array and armed with rifles, without a license from the Governor, as required by the State Military Code, §§ 5 and 6. These sections were held not to be in conflict with the Second Amendment, because "This is one of the Amendments that has no other effect than to restrict the powers of the National Government, leaving the people to look for their protection against any violation by their fellow citizens, of the rights it recognizes to what is called in *New York* v. *Miln* (1837), 11 Pet. (36 U. S.) 139, the 'powers which relate to merely municipal legislation, or what was perhaps more properly called internal police,' not surrendered or restrained by the Constitution of the United States." This language of Justice WOODS was repeated in a briefer but emphatic form by Justice MILLER in *Eilenbecker* v. *District Court* (1890), 134 U. S. 34, with reference to the Fifth, Sixth and Eighth Amendments. Chief Justice WAITE was equally brief in *Ex parte*

Spies (1887), 123 U. S. 131, S. C. 27 AMERICAN LAW REGISTER 23, with regard to the Fourth, as well as to the Fifth, Sixth and Eighth Amendments. The Fifth Amendment was supposed to have been transgressed in these Texas cases.

Bock v. *Perkins et al.*, decided April 13, 1891, by the Supreme Court of the United States, declared not only that a suit against a marshal for seizing goods under an attachment could be removed to a Circuit Court of the the United States, as a case arising under the laws of the United States, but also, that in Iowa, an assignment for the benefit of creditors, embracing "all the lands and all the personal property of every name and nature whatsoever of the" assignor, "more particularly enumerated and described in the schedule" annexed, and "made part of this assignment," did not pass the title to the assignee of a stock of merchandise of which no mention was made in the schedule. Consequently, an attachment could be subsequently issued against the merchandise by a creditor of the assignor, and the marshal would not be liable for making the seizure under the attachment. Justice HARLAN said that "the general description in the first part of the general clause, must be held to be limited by the words which immediately follow, indicating that the property, real and personal, intended to be conveyed, was enumerated in the schedule annexed," because the schedule was expressly made part of the assignment. To this, objection was made that the words referring to the schedule as particularly enumerating the property, were followed by these: "or intended so to be." Justice HARLAN answered: "But this language must be taken in connection with other parts of the instrument, showing that the distribution proposed had reference only to the property particularly enumerated in the schedule," especially as the property was not inconsiderable, but worth ten thousand dollars, and formed the bulk of his estate. "These views are sustained by the weight of authority; and we are referred to no decision of the Supreme Court of Iowa to the contrary;" citing *Wilkes* v. *Ferris* (1810), 5 Johns. (N. Y.) 335, 345; *Driscoll* v, *Fiske* (1839), 21 Pick. (Mass.) 503, 505, 507; *Morris* v. *Armstrong* (1869), 31 Md. 87; *U. S.* v. *Langton* (1829), U. S. C. Ct. D. Mass., 5 Mason 280, 288; *Guerin* v. *Hunt* (1861), 6 Minn. 375; *Wood* v. *Rowcliffe* (1851), 5 Eng Law and Eq. 471; *McAlpine* v. *Foley* (1885), 34 Minn. 251; *Rundlett* v. *Dole* (1839), 10 N. H. 458; *Belding* v. *Frankland* (1881), 8 Lea (Tenn.) 67; *Scott* v. *Coleman* (1824), 5 Litt. (Ky.) 349; Burrill, Assignments (5th ed.), 192-8. Justice HARLAN added that "Numerous authorities are cited for the plaintiff, which are supposed to announce a contrary doctrine. Most of them, however, will be found, upon careful examination, to proceed upon the peculiar wording of the instruments construed. Among these cases is *Bank* v. *Horn* (1855), 17 How. (58 U. S.) 157, 159, 160;" *National Bank* v. *Bank of Commerce* (1880), 94 Ill. 271, 279; *Platt* v. *Lott* (1858), 17 N. Y. 478; *Turner* v. *Jaycox* (1869), 40 N. Y. 470; *Holmes* v. *Hubbard* (1875), 60 N. Y. 183, 185; *Bank* v. *Roche* (1883), 93 N. Y. 374, 378.

In re Claasen, 140 U. S. 200, was the first case in which involved the construction of the Act of March 3, 1891 establishing Circuit Courts of Appeals. The defendant was indited under Section 5,209 Rev. Stats. in the Southern District of New York, and on the 27th of May, 1890, convicted. On March 3, 1891, Congress passed an Act, entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the

Courts of the United States and for other purposes." The fifth section of that Act provides that a writ of error may be taken from an existing Circuit Court direct to the Supreme Court of the United States, in the following cases among others, "in cases of conviction of a capital or otherwise infamous crime." On the 18th of March, 1891, the defendant was sentenced by the Circuit Court to be imprisoned for a term of six years in the Erie County Penitentiary. On the 21st of March, 1891, a writ of error to the Circuit from the Supreme Court was allowed by one of the Associate Justices, and a citation signed, returnable on the second Monday of April, 1891, with the following direction: "This writ is to operate as a *supercedeas* and stay of execution, with leave to the United States to move the Supreme Court of the United States on notice to vacate the stay, as having been granted without authority of law." A motion to set aside the *supercedeas* was denied. Before the Act of March 3d, and at the time of the trial, there was no appeal to the Supreme Court in such cases. Of course, a bill of exceptions was not provided for, either by statute or by rule, and, therefore, though the Court granted the writ because the final judgment on the conviction was rendered subsequently to March 3, 1891, they refused the petition of the defendant for a writ of *mandamus* to compel the Judge who presided at the trial to seal a bill of exceptions which could not have been had at the time of the conviction. The result was a writ which acted as a *supercedeas* without a bill of exceptions.

A good illustration of the truth of the saying "that no question in a *Habeas Corpus* case can be considered settled," is shown in the appeal of one Wood to the Supreme Court (*In re Wood*, decided May 11, 1891, 140 U. S. 278. Concerning opinion of Judge FIELD, P. 370). This case raised the question whether, when the laws of the State did not prohibit colored persons from serving on juries, or make a distinction on account of color, whether a colored person indicted in the State Courts could have a right to remove his case to the Federal Courts, on the ground that the practice of the State officers was to exclude persons of color from the juries. The Court held, as it had held when exactly the same question was raised in *Neal* v. *Delaware*, 103 U. S., 370, 405, 409, that when the statutes of a State do not exclude persons of African descent from serving as grand or petty jurors, a person accused in a State Court of crime, who desires to avail himself of the fact that they were so excluded in the selection of the grand jury which found the indictment against him, or of the jury which tried him, should make the objection in the State Court during the trial, and, if overruled, should take the question for decision to the highest Courts to which a writ of error could be sued out from this Court. Failing to do this he cannot have the decision of the State Court reversed by a Circuit Court of the United States upon a writ of *Habeas Corpus*. It is exactly eleven years since this question was decided, in eleven years more we may expect to have it decided again. The fact that in *Habeas Corpus* proceedings nothing is finally determined, finds its best illustration in the number of times which the Supreme Court had decided that the first six Amendments to the Constitution are restrictions on the Federal Government and not on the States.

In the case of *Leny* v. *Tillson*, 140 U. S. 316, the Supreme Court of the United States took another step in the elucidation of the question, what is "due process of law" in taking property. After deciding, in accordance with previous decisions (see *Davidson* v. *New Orleans*, 96 U. S. 97;

Hager v. *Declamation District*, 111 U. S., 701) that the Act of California of March 23, 1876, entitled "An Act to authorize the widening of Dupont Street in the City of San Francisco," provides for a due process of law for taking the property necessary for that purpose, the Court says, "Errors in the mere administration of the statute not involving jurisdiction of the subject and of the parties, could not justify this Court, in its re-examination of the judgment of the State Court, upon a writ of error, to hold that the State had deprived or was about to deprive the plaintiffs of their property without due process of law." Per Mr. Justice HARLAN, p. 331.

RECENT DECISIONS.

On the 23d of April, 1870.

TRUSTS VOID AGAINST CREDITORS.

One W. M. Thomas signed and delivered to S. Thomas, Jr., a paper in the following words, "I hereby assign to Mr. Thomas, Jr., a note of $7,000, dated . . . . . 1863, made by Mrs. Mary Raymond to me, payable six months after paece, or sooner, at my option. This is to secure Peter Thomas in a note made by him to the state of South Carolina, upon which I was security, and the proceeds of which, to wit, property at the State Works in Greenville, South Carolina, was taken by me for the debts of Barksdale, Perry & Co., and which note is now out and unpaid." He had previously declared in an instrument in writing that he held certain other notes in trust for his wife and free from his martial rights, and he further declared that he reserved to himself the power to collect and invest the same or dispose of it as may be proper for her benefit, as her Trustee, and again, "I hereby relinquish all claim to the same on my individual account." On the back of the deed of trust was this indorsement, "Having used some of the papers, I put in their place the following note of Mrs. Mary Raymond upon which a decree has been made in the Court of Equity for Greenville District, claim on estate of J. M. Turpin in Commissioner's office and on Pickett's estate in same office. This note he subsequently assigned as collateral as above and used in other ways as his own individual property. It further appeared that the alleged trust was secret. Held that the trust so attempted to be created was null and void as against the creditors of W. M. Thomas, who were entitled to the proceeds of the note.

Blythe v. *Thomas*, District Court, C. South Carolina, April 11, 1891, per SIMONTON, J.

TRADE-MARK.

Cream Baking Powder.

A motion was made for a preliminary injunction to restrain the use of the word "Cream" in connection with the words "Baking Powder." It appeared that the plaintiff used the word "Cream" in combination with the words "Price's Baking Powder" and the defendant, using wrappers similar in design used the word "Cream" in combination with the words "National Baking Powder." Judge NELSON, in granting the preliminary injunction, said, "The complainant is certainly entitled to protection in the use of this word in connection with the Baking Powder it manufactures, unless it is adopted and used as description of the article, its ingredients or characteristics etc. The Baking Powder is neither composed nor does that word convey the idea that it is the "Best" or choicest, as asserted by defendant."

Price Baking-Powder Co. v. *Fife*, Circuit Court D, Minnesota, Third Division. April, 1891.